

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1215

To be argued by
IRA H. BLOCK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1215

UNITED STATES OF AMERICA,

Appellee,

—v.—

VICTOR ABRAHAM HOLMES,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

IRA H. BLOCK,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

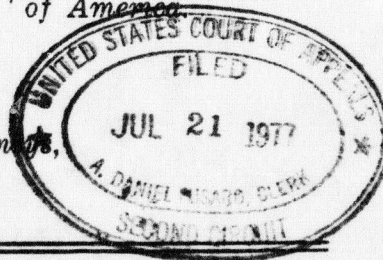


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VICTOR ABRAHAM HOLMES,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Victor Abraham Holmes appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on April 11, 1977, after a four-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment 76 Cr. 454, filed on May 4, 1976, contained two counts. Count One charged Harry Santos-Figueroa, Victor Abraham Holmes and Vincent Hicks with attempting to take money and the actual taking of property, by force, violence and by intimidation, from a federally insured bank in violation of Title 18, United States Code, Sections 2113(a) and 2. Count Two charged the defendants with assaulting and placing in jeopardy the lives of persons by the use of firearms during the course of the bank robbery charged in Count One, in violation of Title 18, United States Code, Sections 2113(d) and 2.

Indictment 76 Cr. 454 superseded Indictment 76 Cr. 203,* which had been filed on February 26, 1976, in two counts, charging Santos-Figueroa, Holmes and Hicks (under the aliases of "Slick" and "Gregory Johnson") with these same offenses.

On April 22, 1976, an evidentiary hearing was held on Holmes' motion to suppress his post-arrest statements made to Detectives of the Major Case Squad of the New York City Police Department and Special Agents of the Federal Bureau of Investigation. This motion was denied by the Honorable Henry F. Werker, to whom Indictment 76 Cr. 203 had been assigned for all purposes, in an unreported opinion filed April 20, 1976.

Following interlocutory proceedings relating to co-defendants Santos-Figueroa and Hicks,** the case was reassigned for trial as to Holmes from Judge Werker to Judge Brieant. Trial commenced on March 1, 1977, and continued through March 4, 1977, when the jury found Holmes guilty of the charges contained in both Counts One and Two.

On April 11, 1976, Holmes was sentenced by Judge Brieant to the custody of the Attorney General for imprisonment for a period of 17 years.***

* An order of *nolle prosequi* was entered as to each defendant at the time of his arraignment on the superseding Indictment, 76 Cr. 454.

** See *United States v. Werker*, 535 F.2d 198 (2d Cir.), cert. denied, 429 U.S. 926 (1976).

*** Vincent Hicks pleaded guilty to Count One before Judge Werker on May 19, 1976, and was on that day sentenced to a study under the former provisions of Title 18 United States Code, Section 4208(b) (now codified at 18 U.S.C. § 4205(c)). Upon return from study, Hicks was resentenced on August 16, 1976 to a term of ten years' imprisonment. Subsequent to Hicks' testimony as a Government witness in the instant case, his sen-

[Footnote continued on following page]

Statement of Facts

The Government's Case

The charges against defendant Victor Abraham Holmes arose out of an attempted bank robbery which occurred at Bankers Trust Company, 1770 Madison Avenue, New York, New York on February 17, 1976. The Government's case consisted chiefly of testimony from bank employees, law enforcement officers who conducted an investigation into the events, Vincent Hicks, an accomplice to the crime charged, and eyewitnesses to the crash of the rented car used to effect a getaway from the bank.

A. Planning for the Robbery

Harry Santos-Figueroa and Vincent Hicks had grown up on the same block on the east side of Manhattan and had known each other for seven years at the time they robbed the Bankers Trust Company together. (Tr. 337).^{*} About three weeks before the robbery Santos-Figueroa introduced Hicks to Victor Holmes. (Tr. 337-38). From that first meeting until the day of the robbery Hicks saw Holmes on a daily basis, and they spent a considerable amount of time together each day. (Tr. 338-39, 342). During the Washington's Birthday weekend Hicks, Santos-Figueroa and Holmes talked with each other several times about robbing banks. (Tr. 343-44). These conversations took place in Santos-Figueroa's girlfriend's apartment on 105th Street, in Hicks' house on 115th Street and in the street. (Tr. 344).

tence was reduced by Judge Werker to a term of eight years.

Harry Santos-Figueroa pleaded guilty to Count Two before Judge Werker on February 17, 1977. On March 21, 1977, he was sentenced to the custody of the Attorney General for treatment and supervision as a youth offender pursuant to the provisions of Title 18, United States Code, Sections 5010(b) and 5017(c).

^{*} "Tr." refers to the trial transcript.

In the girlfriend's apartment on Friday, February 13th, Holmes told the others that "he was tired of taking penny ante" and that "it would be better for us if we could do something else." (Tr. 345). Hicks suggested robbing a branch of Manufacturers Hanover Trust Company on 116th Street and Second Avenue and Holmes answered, "Yeah, that is where they have the armored car." (Tr. 345). Holmes said he would drive Hicks and Santos-Figueroa to and from the bank. (Tr. 346).

The next day, Saturday, February 14th, Hicks, Holmes and Santos-Figueroa again met on 105th Street. (Tr. 347). They talked about robbing the bank that Monday, but after realizing that Monday was a holiday, they agreed to rob the bank on Tuesday. (Tr. 347). The three of them were going to walk to the bank to look it over, but Holmes and Santos-Figueroa were otherwise engaged, and Hicks told them to forget about visiting the bank. (Tr. 347).

On that Sunday, February 15th, Hicks was in a friend's apartment where he read an article and accompanying centerfold photospread in the *Daily News* (GX 93) about a bank robber known as the rabbit fur bandit who had entered a bank without a weapon of his own, disarmed the bank guard and then robbed money from the tellers. (Tr. 349, 351-52). Hicks took this centerfold and went to 105th Street where he had a conversation with Santos-Figueroa. (Tr. 353). Santos-Figueroa called Holmes over; Hicks showed him the *Daily News* centerfold, saying "Look how easy it is. He goes in there without a gun, beats up the guard, takes his gun and robs the bank." (Tr. 353). Holmes replied, "It looks easy," and asked to borrow the centerfold, promising to "bring it right back." (Tr. 354). Hicks consented and Holmes took the centerfold from him, folded it up and put it in his jacket pocket. (Tr. 354). Although Holmes didn't have a car with him on Sunday, he told Hicks that he would be renting one on Monday. (Tr. 356-57).

At about 3:00 o'clock Monday afternoon (February 16th), Holmes and Santos-Figueroa came over to Hicks' apartment. (Tr. 357). Hicks' gun, a .38 caliber revolver, was on the bed. Holmes picked it up and explained that if Hicks gave him the next gun he obtained, all three of them would then have weapons. (Tr. 358). Santos-Figueroa told Hicks that Holmes had obtained the car and Holmes added that the car was "downstairs . . . in the parking lot." (Tr. 359). Later, in Santos-Figueroa's girlfriend's apartment, Holmes, Santos-Figueroa and Hicks agreed to get together at 9:00 o'clock the following morning in Hicks' apartment to rob the bank. (Tr. 360-61).

B. The Robbery

On the day of the robbery Holmes called Hicks on the telephone at his home at about 9:00 a.m. (Tr. 387-88). Holmes and Santos-Figueroa arrived at the Hicks apartment about 15 minutes later. (Tr. 389). The three of them then started to get ready to rob the bank. (Tr. 390). Soon they left Hicks' apartment and entered a blue Nova which was in the parking lot. Santos-Figueroa had a loaded .32 caliber automatic pistol and Hicks had his .38 caliber revolver. (Tr. 396-97). Holmes warmed the car up and drove to the Manufacturers Hanover Trust Company at 116th Street and Second Avenue. (Tr. 398). On the way over Holmes reminded Santos-Figueroa to be sure to get the bank guard's gun so that each member of the trio would have a gun. (Tr. 399).

Looking over the Manufacturers Hanover branch for a while, Holmes decided robbing that particular bank was too risky because a number of construction workers nearby had walkie-talkies and might take note of the blue Nova's license plate. (Tr. 399). Holmes drove the Nova toward First Avenue and 116th Street where there was located a branch of First National City Bank but, before arriving there, he decided against robbing that bank

because it was too small. He headed the car around in a U-turn on 116th Street toward Bankers Trust Company at Madison Avenue. (Tr. 400-01). When the Nova arrived at Madison Avenue, Holmes turned right on Madison and then left on 117th Street. (Tr. 401-02). Hicks and Santos-Figueroa left the car and walked around the block the long way (to Fifth, then left to 116th and then left again to Madison) to the entrance to the bank. (Tr. 402-03). Holmes took this same route with the car. (Tr. 402-03).

While Holmes waited in the car prepared for the getaway, Santos-Figueroa entered the bank and Hicks waited outside near the revolving doors. (Tr. 404). Hicks glanced at his watch and saw that it was 10:15 a.m., then looked inside the bank and noticed Santos-Figueroa struggling with the uniformed bank guard, Winston Hill. (Tr. 34-36, 404). Hicks went through the revolving door, there was a shot and Hill went down. (Tr. 404). Drawing his revolver, Hicks disarmed a second guard, Joseph Valentin, forced Valentin to lie on the floor and then watched Santos-Figueroa disarm Hill.* (Tr. 50-51, 404-05). Hicks demanded money from a female teller but was refused. (Tr. 406). Santos-Figueroa called out to Hicks that the alarm was running and the police were coming, prompting the duo to leave. (Tr. 406). When they got outside Holmes was signalling them with his arms and with the horn from the car, which was double-parked with the engine running on the west side of the avenue between 116th and 117th Streets. (Tr. 406-07).

* Both Hill and Valentin were armed with .38 caliber Smith & Wesson police special revolvers which were bank property. (Tr. 39-40, 50-51).

C. The Getaway, Subsequent Chase and Arrest of Santos-Figueroa

With all three of them in the front seat, the car took off uptown on Madison Avenue at high speed. (Tr. 407-08). Holmes drove as fast as 100 mph and the Nova passed a gypsy cab between 117th and 118th Streets, crashed into a lamp post while negotiating a right-hand turn onto 122nd Street, and then followed a route which took it east on 120th Street. (Tr. 407-10). During the getaway, Holmes asked Hicks if he got the money. (Tr. 411). When Hicks told him no, Holmes stated, "Now we [are] going to go to Queens and we [are] going to get that bank." (Tr. 411).

Shortly after the getaway car sped off from the bank, Detective Frank Giliberti and Police Officer Kenneth Pearson were traveling westbound on 116th Street toward Madison Avenue in their patrol car when they received information from passersby outside the bank. (Tr. 72, 106). They turned their patrol car around and started to drive north on Madison Avenue, looking up and down the side streets, until they reached 120th Street where they had a conversation with the driver of the gypsy cab. (Tr. 74, 107). As a result of this conversation, they drove eastbound on 120th Street in pursuit of a blue Chevrolet Nova automobile, New York registration 284-ZEL. (Tr. 75-76, 108-09). The blue Nova was not sighted until the police car neared Third Avenue; at that point the officers noticed the blue Nova passing a red light at the intersection of East 120th Street and Second Avenue. (Tr. 76, 109). The officers gave chase, with flashing light and siren, and the blue Nova travelled further east on 120th until it crashed into two parked automobiles on the north side of 120th Street near Pleasant Avenue. (Tr. 77, 109).

Driving parallel to the Nova and noticing no one inside, the officers drove further east, left their car and

entered the Senator Robert F. Wagner, Sr. housing project. (Tr. 83, 110). A maintenance worker in the project, Paul Ross, attracted their attention, leading them to observe two males running through the project. (Tr. 83, 110, 136-40). After brief foot pursuit, the officers arrested one of the men, later identified as Harry Santos-Figueroa, in a parking lot within the Wagner Houses near 124th Street between Pleasant and Paladino Avenues. (Tr. 83-85, 110). From underneath an abandoned automobile in the lot where Santos-Figueroa was arrested the officers recovered a .32 caliber automatic pistol (GX 88A), one spent shell (GX 88C), five live rounds of ammunition and a magazine (GX 88B),* which Santos-Figueroa had thrown to the ground as the officers approached him. (Tr. 84-86).

D. Holmes and Hicks Avoid Immediate Arrest

After the Nova crashed the three bandits got out and went together to the entrance to the housing project where Holmes suggested that they split up. (Tr. 412). Hicks ran into the project toward the East River, going as far as 121st Street between Second and Third Avenues where he hid in a building and successfully escaped apprehension that day. (Tr. 416). Holmes and Santos-Figueroa took off together in a different direction further into the Wagner Houses, running right past the maintenance worker, Paul Ross, almost knocking him down.** (Tr. 138-40, 413-15).

* It was stipulated that an FBI ballistics expert would have testified that the gun was operable, and that both the bullet which wounded the bank guard and the spent shell had been fired from the .32 caliber pistol. (Tr. 471-73; GX 100).

** Ross made a positive in-court identification of defendant Holmes as being one of the men he had seen alight from a crashed car and run past him on the morning of February 17th. (Tr. 141-42, 151).

In the course of his flight Holmes was seen by Lynn Johnson, a 12 year old student at nearby P.S. 206, running from the crashed Nova toward the building in the Wagner housing project in which she lived. (Tr. 199-207, 212-13). Holmes was also seen shortly after the crash inside the lobby of that building, 445 East 120th Street, by Rachel Johnson, Lynn's mother.* (Tr. 227-33).

E. Holmes' Arrest

Thomas Hallinan, a detective on the Major Case Squad, the New York City Police Department unit which jointly with the FBI investigates bank robberies occurring within the City, responded to the Bankers Trust Company branch at 1770 Madison Avenue at about 10:25 on the morning of the attempted robbery. (Tr. 275-76). At the bank he coordinated the investigative efforts of members of the Major Case Squad (Tr. 276), and caused inquiries to be made by other detectives concerning the blue Chevrolet Nova, New York registration 284-ZEL. (Tr. 305, 319-22). Detective Foster informed him that the car was registered to Olin's Rent-A-Car and had not been reported stolen. (Tr. 320-21). Detective Ross telephoned Olin's Rent-A-Car and informed Hallinan that their records listed the blue Nova as being under rental to Victor Holmes of 311 Pleasant Avenue in Manhattan. (Tr. 320-22). From the bank Detective Hallinan went to the 25th Precinct and was present during the post-arrest interview of Harry Santos-Figueroa. (Tr. 277). Later that day he was present at 311 Pleasant Avenue

* While Mrs. Johnson did not know Holmes by name, she recognized him as being related to a woman named Barbara Graves who lived in an apartment on the ground floor of the building. (Tr. 230-33). Mrs. Johnson had seen Holmes more than 75 times during the six years she had lived in the building before the crash. (Tr. 233). Her in-court identification was positive. (Tr. 238).

in Manhattan together with other law enforcement personnel for the purpose of arresting Victor Holmes on bank robbery charges. (Tr. 278).

A little past 7:00 p.m. that evening Holmes was observed walking north on Pleasant Avenue and entering his residence; Hallinan transmitted this information over his portable radio to other detectives inside the building. (Tr. 279). When Hallinan entered the building and arrived upstairs at Apartment 4B, Holmes was in custody. (Tr. 279). Remaining in the apartment between two and five minutes, Hallinan, Holmes and Special Agents Corliss and Martineau of the FBI went downstairs, entered an unmarked FBI automobile and drove to FBI headquarters at 201 East 69th Street, arriving there at approximately 7:45 p.m. (Tr. 280-81). During the 15 minute trip downtown, Agent Corliss orally advised Holmes of his constitutional rights. (Tr. 282). Asked by Agent Corliss if he wanted a lawyer, Holmes replied, "No, I want to cooperate." (Tr. 282). Holmes then turned to Detective Hallinan and said, "Man, I appreciate the way you took me. You didn't embarrass me. You didn't beat me. It was really good." (Tr. 282).

F. The Confession

Upon arrival at FBI headquarters Holmes was escorted to an interview room. (Tr. 283). Agent Martineau asked Holmes to read an FBI advice of rights form, which he did. (Tr. 283). Holmes signed this form, and his signature was witnessed by Hallinan. (Tr. 284-85). Hallinan identified himself to Holmes by displaying his police shield and I.D. card, and then once again orally recited Holmes' rights. (Tr. 285). Holmes stated he understood his rights and when again asked if he wished to consult an attorney, repeated, "No, I want to cooperate. You have treated me right. You treated me like a man." (Tr. 286).

About twenty minutes into the interview Holmes admitted that he had been at the bank and had driven the blue Nova to the robbery, which he had planned. (Tr. 288). He identified Harry Santos-Figueroa and Gregory Johnson, a/k/a "Slick", as being his two partners in the robbery. (Tr. 288). He also identified the .32 caliber automatic pistol (GX 88A) which had been recovered earlier that day as having been used by Santos-Figueroa in the robbery. (Tr. 288). Describing the robbery further, Holmes said that Santos-Figueroa and Slick had entered the bank while he waited outside in the car. (Tr. 289). When they came running out of the bank and jumped in the car, he drove off at a high rate of speed, almost ran some people down and then "crashed the car up to stop the police." (Tr. 288-90). After the crash he jumped out of the car, ran through the Wagner Houses and went to the clinic. (Tr. 290). Although requested to do so, Holmes refused to provide a signed statement of his account of the bank robbery. (Tr. 293-94).

G. Holmes' Contacts with Hicks in the MCC

Hicks was arrested on March 8, 1976 after robbing another bank. (Tr. 327-28, 416). On the following day, March 9th, he saw Holmes in the Metropolitan Correctional Center and had a brief conversation with him. (Tr. 416-17). Later in March Holmes came over to Hicks as he was moving into his jail room, said "You know I didn't rat on you," and added some jailhouse wisdom about the possible sentences each of them might receive.* (Tr. 420-21). Before Holmes broke off the con-

* The exact words ascribed to Holmes by Hicks were as follows:

"... you know that you could only get a zip-six and you don't have to worry, because you [are] under age, you [are] under 25, but a person like me, I am over 25 and I could get more time than you can." (Tr. 421).

versation due to the arrival of other inmates, he mentioned to Hicks that he had avoided immediate arrest by running into a building. (Tr. 421).

The Defense Case

Victor Holmes did not testify in his own behalf. The sole witness called by the defense was the defendant's older brother, John Holmes. In an effort to blunt the impact of Rachel Johnson's in-court identification of defendant Victor Holmes, brother John testified that on February 17, 1976 he resided in Apartment 1B at 445 East 120th Street along with his aunt, Barbara Graves, and other members of her family. (Tr. 477). This apartment was on the ground floor of the building and, thus, during the time he lived at that address he came and went on the ground floor on many occasions. (Tr. 477). John Holmes further explained that his brother Victor did not live in that apartment and visited there only once or twice a month. (Tr. 477-78).

ARGUMENT

POINT I

Holmes Is Not Entitled To A New Trial On The Ground That The Jury Heard Evidence That He Had Borrowed The Gun Used In The Robbery.

Holmes' primary claim on appeal is that he is entitled to a new trial because the jury heard allegedly prejudicial testimony that on one occasion prior to February 17th Holmes borrowed from his co-defendant Hicks a gun which was later used to commit the bank robbery. Contrary to Holmes' claim, the challenged evidence was substantially relevant for the purpose of showing Holmes' motive and intent to commit the crime charged as well

as the origin and development of the criminal conspiracy among the defendants. In any event, although the testimony could properly have been received in evidence and considered by the jury, at the defendant's request the District Court struck the testimony and told the jury to disregard it.

Appellant Holmes concedes that the trial court's denial of the motion for a mistrial was correct if the challenged testimony was admissible upon balancing the probative value of this evidence against its possible unfair prejudicial effect. (Br. 8). FED. R. EVID. 403. He likewise acknowledges that this balancing should be accomplished in the context of the particular factual setting of this case. Here the testimony challenged was highly probative of Holmes' motive and intent actively to participate in the crimes charged—which included the theft at gunpoint of revolvers from two bank guards—and its prejudicial effect in the context of the other proof at trial was negligible.

This Court has repeatedly held that evidence of prior similar acts is admissible when substantially relevant for a purpose other than merely showing criminal character. *United States v. Grady*, 544 F.2d 598, 604-05 (2d Cir. 1976); *United States v. Magnano*, 543 F.2d 431, 435 (2d Cir. 1976); *United States v. Johnson*, 382 F.2d 280, 281 (2d Cir. 1967); *United States v. Deaton*, 381 F.2d 114, 117 (2d Cir. 1967). See also FED. R. EVID. 404(b). This so-called inclusionary form of the rule, favored by commentators and firmly established within this Circuit, results in a broad range of admissibility.* *United States v. Gerry*, 515 F.2d 130, 141 (2d Cir.), cert. denied, 423 U.S. 832 (1975); *United States v. Eliano*, 522 F.2d 201,

* Accordingly, Holmes' reliance (Br. 8) on *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975), a Sixth Circuit decision applying the exclusionary form of the other crimes evidence rule is misplaced.

202 (2d Cir. 1975); *United States v. Deaton*, *supra*, 381 F.2d at 117. The testimony criticized here lay well within that range.

Proof concerning borrowing of the gun consisted exclusively of the following two questions and answers:

"Q. When Mr. Holmes picked it up that day, was that the first time he had ever had that particular gun of yours in his possession?

A. No, he borrowed it one time.

Q. Before that?

A. Yes." (Tr. 358).

This testimony about Holmes having borrowed the gun * sometime within the three weeks before February 17th was elicited as part of Hicks' description of a meeting with Holmes at Hicks' apartment on the day before the robbery. During this meeting, the purpose of which was to finalize plans for the robbery, Holmes expressed his desire for a gun and asked Hicks to give him the next gun he got "so that all three" would have weapons. (Tr. 358).

It is readily apparent that evidence about Holmes borrowing the gun was a building block in a more comprehensive structure establishing Holmes' motive and intent to commit the crimes for which he was on trial; it tended to associate Holmes not only with the bank robbery itself, but with two important elements of that robbery—intimidation and the use of firearms to effect compliance with the robbers' demands, and the acquisition of additional weapons for the robbers' arsenal by taking service revolvers from the two guards. Clearly Holmes'

* The .38 caliber revolver to which the quoted testimony referred was one of the guns actually used in the robbery. (Tr. 358, 372, 397).

desire to own a gun—as shown both by the testimony complained of and by proof of his statements to that effect to his accomplices to which objection was neither registered at trial nor here—would have been fulfilled if the robbery had been wholly successful. The testimony additionally demonstrated Holmes' knowledge that Hicks possessed a weapon to use in robbing a bank and illustrated the close working relationship which developed between Hicks and Holmes after they were introduced to each other by Santos-Figueroa no more than three weeks before the robbery.*

The allegedly offending testimony was clearly admissible under the inclusionary form of the other crimes evidence rule followed in the Second Circuit. As this Court said in *United States v. Leonard*, 524 F.2d 1076, 1090-91 (2d Cir.), *cert. denied*, 425 U.S. 958 (1975), similar act evidence is admitted to show wilfulness and for other related purposes, "not because it may indicate commission of a crime but in spite of that." Furthermore, evidence of prior similar acts is admissible to prove knowledge, intent, and design if they are "placed in issue . . . by the nature of the facts sought to be proved by the prosecution . . ." (*United States v. Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971)), and the Government need not wait to see if the defendant contests the issues on which the other crimes proof has probative value before presenting the testimony. *United States v. Johnson*, *supra*, 382 F.2d at 281; *United States v. Deaton*, *supra*, 381 F.2d at 118 n.3.

* One would hardly expect, even in the crowded metropolis which is New York, that persons other than those who completely trusted, relied upon and enjoyed the confidence of one another would ask to borrow, or agree to lend, a .38 caliber revolver between themselves with the same alacrity as a cup of flour or sugar passes between neighbors.

Moreover, the testimony concerning Holmes' prior borrowing of Hicks' gun was admissible under the doctrine followed in this Circuit that evidence of another crime may properly be introduced if the other offense is logically connected with that on trial such as, to take two appropriate examples applicable here, where the prior act is so intertwined with the guilty act itself as to form part of a continuous, ongoing pattern of criminal action, *United States v. Bozza*, 365 F.2d 206, 213-14 (2d Cir. 1966), or proof as to the prior act displays the background, origin and development of the defendants' criminal conspiracy. *United States v. Magnano*, *supra*, 543 F.2d at 435; *United States v. Natale*, 526 F.2d 1160, 1173-74 (2d Cir.), *cert. denied*, 425 U.S. 950 (1976); *United States v. Cioffi*, 493 F.2d 1111, 1115 (2d Cir.), *cert. denied*, 419 U.S. 917 (1974).

As to any unfair prejudicial effect, the evidence in question here was certainly not highly inflammatory. Indeed, it is difficult to imagine how proof as to Holmes' prior possession of the borrowed gun could further arouse inflammatory emotions of the jurors when the accused was charged with an armed robbery in which a guard had been shot. See *United States v. Bradwell*, 388 F.2d 619, 622 (2d Cir.), *cert. denied*, 393 U.S. 867 (1968); *United States v. Bozza*, *supra*, 365 F.2d at 214. Finally, the trial judge delivered a firm, even emphatic, cautionary instruction concerning the testimony which commanded the jurors to restrict their deliberations to the crimes for which Holmes was on trial. (Tr. 385-86).^{*} In

^{*} Here Judge Brieant permitted defense counsel to elect as a matter of trial strategy whether or not he wished to have the jury specially instructed and, if so, to frame a desired instruction. (Tr. 376-77, 383-84). After consultation with his client, defense counsel submitted a proposed instruction, and Judge Brieant cautioned the jury at length:

"Yesterday the government's witness, Vincent Hicks,
[Footnote continued on following page]

a case where the testimony could properly have been admitted, such an instruction did not only cure any possible error, *see United States v. Ong*, 541 F.2d 331, 341 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3509 (Jan. 25, 1977); *United States v. Eliano*, *supra*, 522 F.2d at 202; *United States v. Keilly*, 445 F.2d 1285, 1289 (2d Cir.), *cert. denied*, 406 U.S. 962 (1971); *United States v. Deaton*, *supra*, 381 F.2d at 118, but it gave the defendant more than he could justifiably demand.*

during the course of his testimony made several statements from which you might possibly conclude that perhaps Mr. Victor Holmes, who is on trial in this case, might have committed some other kind of crime in the past or some certain crimes in the past. That may or may not be a proper inference from what he said.

However, I want to instruct you very clearly at this time that Mr. Holmes is on trial here before you arising out of the alleged incident at Banker's Trust Company on February 17, 1976, and nothing else, nothing else, and I instruct you that you are to disregard completely any notion or inference that you may have drawn as a result of anything Mr. Hicks may have said regarding any possible involvement by Mr. Holmes in any other matters which might possibly violate state law or constitute any other type of a crime. That sort of thing is not before you.

It is not part of this case. You are only trying the charges set forth in this indictment and nothing else and any such inference or conclusion that you might have drawn from Mr. Hicks' statements which may be adverse to Mr. Holmes is not to enter into any part of your deliberations in this trial, either consciously or unconsciously. I direct you to put it out of your mind." (Tr. 385-86).

With reference to the utility of a curative instruction, Judge Brieant here commented that "this happens to be a pretty good jury and they seem attentive and I think they are willing and able to follow instructions of that sort." (Tr. 377).

* Without any but the most cursory elaboration, Holmes asserts (Br. 9) that the trial court's alleged error in refusing to declare a mistrial "cannot be dismissed as 'harmless beyond a reasonable doubt'" under *Chapman v. California*, 386 U.S. 18, 24 (1967). Although Holmes has failed to show error, even if error were found, it is evident from a review of the volume and

[Footnote continued on following page]

POINT II

The Sentence Imposed By The District Court Was Within The Statutory Maximum Of 25 Years And Is Not Subject To Review.

Recognizing that the prison sentence of 17 years imposed by the District Court was well within the statutory limit of 25 years and therefore entirely lawful, Holmes nonetheless urges this Court to conclude that his sentence was excessive and arbitrary, and invites the substitution of an appellate judgment of conviction and commitment to the custody of the Attorney General for imprisonment for that pronounced by the able and experienced District Judge who presided over the trial and thus was in the best position to assess all relevant sentence considerations. There is neither basis in law nor in fact, we respectfully submit, for such supererogation of the proper exercise by

strength of the Government's proof tending to show Holmes' guilt of the offense charged that it was harmless beyond a reasonable doubt. Applying the oft-recited precepts of *Chapman v. California*, it is obvious that the testimony at issue was unlikely to have *effected*—or even to have *affected*—the outcome of the trial. *Id.* at 22. The formidable case which was presented against the defendant can be summarized as follows:

Hicks, already convicted of the crime, gave extensive testimony concerning Holmes' participation in every stage of the robbery—conception, planning, and execution. Similarly, other direct evidence, and even the circumstantial proof of guilt was nothing short of overwhelming. For example, Holmes rented the car used in the robbery, a disinterested eyewitness positively identified Holmes as one of the two men whom he saw flee from the crashed escape car (Tr. 142), and a second—again totally neutral—witness placed Holmes near the scene of the crash. (Tr. 231). So too, there was evidence from which the jury could properly conclude that Holmes sought to fabricate alibis as to his own whereabouts (Tr. 118-22) and that of his rented Nova automobile on the morning of the robbery. (Tr. 244-46). And, of course, after his initial false exculpatory statements, Holmes made a full confession to the authorities. (Tr. 288).

Judge Brieant of the broad sentencing discretion conferred by Congress with respect to the crime of aggravated bank robbery committed by Holmes.

The Supreme Court has recently reaffirmed the "general proposition that once it is determined that a sentence is within the limitations set forth in the statute under which it is imposed, appellate review is at an end." *Dorszynski v. United States*, 418 U.S. 421, 431 (1974). *Accord*, *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Gore v. United States*, 357 U.S. 386, 393 (1958). Likewise, in a long line of cases this Circuit has consistently stated that, absent reliance on improper considerations or materially incorrect information, a sentence within statutory limits is not reviewable. *E.g.*, *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *United States v. Seijo*, 537 F.2d 694, 699-700 (2d Cir. 1976), *cert. denied*, 45 U.S.L.W. 3464 (Jan. 10, 1977); *United States v. Glazer*, 532 F.2d 224, 231 (2d Cir. 1976), *cert. denied*, 429 U.S. 884 (1976); *Counts v. United States* 527 F.2d 542, 544 (2d Cir.), *cert. denied*, 426 U.S. 923 (1976); *United States v. Goldberg*, 527 F.2d 165, 173 (2d Cir. 1975), *cert. denied*, 425 U.S. 971 (1976); *United States v. Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States v. Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973); *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). Thus no legal basis for overturning Holmes' lawful sentence exists.

Furthermore, it is well established in the federal system that trial judges are afforded vast discretion in the imposition of sentence. *See, e.g.*, *United States v. Tucker*, *supra*, 404 U.S. at 446-47; *United States v. McCord*, 466 F.2d 17, 18 (2d Cir. 1972). Only if a sentence displays so manifest an abuse of discretion as to violate traditional concepts will the Court of Appeals overturn the long established precedents of non-intervention. *United States v. Riniolo*, Dkt. No. 76-1583,

Slip op. 3343, 3345 (2d Cir., May 4, 1977); *United States v. Holder*, 412 F.2d 212, 214-15 (2d Cir. 1969). The 17 year sentence in this case represents a correct exercise of sentencing discretion by the court below.

While salutary, this Court has said that a statement of reasons at the time of sentence explicating the trial judge's exercise of his discretion is not mandatory. *United States v. Velazquez*, *supra*, 482 F.2d at 142; *United States v. Seijo*, *supra*, 537 F.2d at 699. Nevertheless, in the instant case Judge Brieant did clearly make a matter of record his reasons for passing sentence as he did; these neither included nor made reference to improper criteria or materially incorrect information.

The District Court considered the severity of the crime—one of violence involving the use of a gun. (Sent. Tr. 6).^{*} A guard was shot in the course of the crime, and it was only fortuitous that he did not die. (Sent. Tr. 7). Moreover, based upon his having heard the evidence presented at trial Judge Brieant stated his conviction, which Holmes recognizes (Br. 11) to be a wholly appropriate interpretation of the trial record, that Holmes was the ringleader and was the most culpable of the three participants in the robbery. (Sent. Tr. 6). Furthermore, the District Judge regarded as credible testimony from the accomplice Hicks that there was an understanding among the robbery participants that Santos-Figueroa and Hicks would obtain an additional gun from the bank guard for Holmes' use. (Sent. Tr. 6). Finally, describing Holmes' record as a bad one, Judge Brieant noted that although he was not paying attention to prior *arrests*, Holmes had twice previously been *convicted* of crimes, in 1973 and 1976, and had escaped imposition of a meaningful sentence. (Sent. Tr. 7-8). Observing that Holmes had

^{*} The prefix "Sent. Tr." followed by a number refers to pages within the transcript of the April 11, 1977 sentence proceedings.

been "in and out of the revolving door" of the criminal justice system which seemed to create a feeling that he could rob with impunity, Judge Brieant consequently chose to impose a sentence which would act both as a specific deterrent to Holmes and a general deterrent to others in the community. (Sent. Tr. 7-8). Clearly, this sentence was predicated on the most proper of considerations. Indeed, we do not understand appellant to contend otherwise.

Holmes' sole contention in this regard is that the disparity among the sentences received by Santos-Figueroa, Hicks, and Holmes warrants a modification of his sentence. Such simply is not the law. *United States v. DiStefano*, Dkt. Nos. 76-1581, 76-1582, slip op. 3539, 3553 (2d Cir., May 16, 1977). Sentence is to be tailored to the offender, not the offense. The Supreme Court has squarely held time and again that the Constitution permits qualitative differences in meting out punishment, and there is no requirement that two persons convicted of the same offense receive identical sentences. *E.g.*, *Williams v. Illinois*, 399 U.S. 235, 243 (1970). Quoting from its decision two decades earlier in *Williams v. New York*, 337 U.S. 241, 247 (1949), in *Williams v. Illinois* the Court said: "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." 309 U.S. at 243. Following the rule laid down by the high court, this Circuit has similarly declined to evaluate the correctness of an imposed sentence "by comparing it to any claimed standard of lenience allegedly shown . . . in cases represented to be similar. . . ." *United States v. McCord*, *supra*, 466 F.2d at 19.

While as a matter of law it is unnecessary to attempt to reconcile the different sentences received by the three participants in the same bank robbery, it requires no speculation to understand why there were differences

between the sentences here imposed on Hicks and Santos-Figueroa, on the one hand, and Holmes on the other. Holmes went to trial and he was sentenced by a judicial officer who presided at and listened to the Government's evidence presented during the trial. From this knowledgeable vantage point the trial judge perceived Holmes as the ringleader—the instigator or moving force behind the crime; Holmes arranged to provide the getaway car and, like many ringleaders, remained outside in the Nova while his underlings were in the bank taking a greater risk. In addition, Holmes had two prior convictions. Moreover, there were disparities in age, and employment history and social situation among the three defendants; indeed one of the three offenders was sentenced under the Youth Corrections Act. Finally, of course, Hicks testified for the Government.

Holmes received a substantial sentence; he was, however, convicted of a substantial crime. The bank robbery was a reckless crime of violence involving the wanton shooting of a bank guard totally without provocation. Holmes not only was well aware that loaded firearms were to be used to perpetrate the robbery but, in fact, ratified, adopted and counselled such escalation of the crime by his demand that his confederates obtain a bank guard's gun for his own use. Considering all of these circumstances, the contention that his sentence should undergo appellate reduction is totally without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

IRA H. BLOCK,
AUDREY STRAUSS,
*Assistant United States Attorneys,
Of Counsel.*

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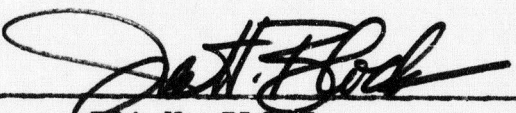
IRA H. BLOCK

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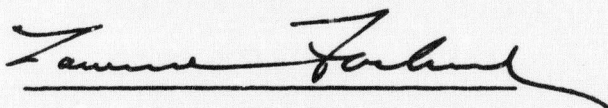
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